In the Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-129
83-289

CLYDE HOLLOWAY, ET AL., PETITIONERS

v.

VIRGIE LEE VALLEY, ET AL.

RAPIDES PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

VIRGIE LEE VALLEY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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Pursuant to Rule 22.5, petitioners CLYDE HOLLOWAY, et al. (No. 83-129), and RAPIDES PARISH SCHOOL BOARD, et al. (No. 83-289), file this joint reply to respondent Valley's and the United States Government's Briefs in Opposition.

First. Respondent Valley's Brief in Opposition materially misstates the law. Nothing in *Flax* v. *Potts* (Br. Op. 11) approves the busing of five-year-olds two hours a day. And this Court's opinion in *Swann* makes it clear that remedial power in desegregation cases is not wholly boundless. As Chief Justice Burger declared for a unanimous Court in *Swann*, 402 U.S. at 28, "it must be recognized that there are limits."

Second. Two material misstatements of fact taint the Government's Brief in Opposition.

A. The Government contends (Br. Op. 8) that the district court did not err in rejecting the other desegregation plans that were submitted on remand as alternatives to closing Lincoln Williams and Forest Hill Schools. The Solicitor General says (Br. Op. 8): "the [district] court considered each of those plans carefully."

The record shows precisely the opposite.

When this case was remanded to the district court, the private plantiffs proposed that Lincoln Williams and Forest Hill remain open as K-3 schools, a proposal that was supported by petitioners herein.[1] But the district court rejected this proposal peremptorily, not carefully, saying only "We cannot allow K-3 schools . . . ." On appeal to the Fifth Circuit, the United States conceded that the district court had misstated the law of the Fifth Circuit in this regard. U.S. Brief [Fifth Circuit], pp. 28-29 n.33. *See Lee* v. *Macon County Board of Education*, 616 F.2d 805, 812 (5th Cir. 1980). The decision of the panel majority below not only departs from prior Fifth Circuit case law, but is squarely at odds with the law of the Fourth Circuit:

"If certain proper circumstances may justify an entire

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[1] Transcript of hearing of June 30, 1981, at 7-8:

[Counsel for plaintiffs]: "We would submit that Lincoln Williams and Forest Hill be K through 3 schools. . . . The only reason why we propose that is because somewhere in the Fifth Circuit's order, I believe mention was made of the fact that the schools in the urban area were given the privilege of keeping their small children close to home; whereas this privilege was not extended to the children in the rural areas. For that reason we said if the court feels that there must be another plan, then that is the proposal.

THE COURT: "Well, the court did make that statement, that is right."

> school remaining of one race then, *a fortiori*, the same circumstances will justify the two lowest grades and kindergarten remaining predominantly of one race, especially considering the time of travel and age of the children."

Thompson v. *Newport News School Board*, 363 F.Supp. 458, 463-64 (E.D. Va. 1973), *aff'd* 489 F.2d (4th Cir. 1974)(en banc).

B. The Solicitor General says (Br. Op. 7 n.6) that there is no record evidence showing that the district court's order requires five-year-olds "to take a 40-mile, two hour bus trip."

To the contrary, the bus driver route sheets introduced into evidence as Forest Hill Exhibit 14 show that 181 former Forest Hill School students must be bused past Forest Hill School en route to Lecompte. These students are picked up as early as 6:45 a.m. and they are on buses nearly an hour en route to Lecompte. With respect to kindergarteners through third-graders, the uncontradicted testimony of Parks Sansing (Tr. June 30, 1981 Proceedings, p. 57) establishes that these pupils are bused an additional 2.2 miles and twenty to twenty-five minutes within the city limits of Lecompte as buses move from Lecompte Elementary to Carter C. Raymond and thence to Rapides High School before beginning the trip back to Forest Hill and beyond. Mary Miles, a black seamstress and mother of a five-year-old, testified (Tr. Sept. 17, 1980 Proceedings, pp. 30-31) that her son must be bused 30 miles round-trip under the district court's plan. And the School Board objected to busing "in some instances, busing kids forty miles, not just right next door." Tr. August 27, 1980 Proceedings, p. 27.

Chief Judge Clark in his dissent categorically states (Pet. App. 17a-18a):

> "These children, ranging in age from kindergarten through early elementary grades, must rise early, board

> buses, drive past their community school houses and go to a distant town and then reverse the journey in the evenings. Some will spend two hours a day on the school bus."

With all respect to the Government, Chief Judge Clark did not pull his two-hour figure out of the air.

Third. In opposing certiorari in this Court in *South Park Independent School District* v. *United States*, No. 82-2014, *cert. denied* October 3, 1983, the Government emphasized (Br. Op. 5, 7-8) that the district court excluded grades K-3 from its desegregation plan because (Br. Op. 7a):

> "It is constitutionally permissible for the Court to allow children in grades K through three to remain in neighborhood schools."[2]

And as recently as August 11, 1983, the Fifth Circuit affirmed a desegregation plan for Dallas that exempted children in grades K-3 from bus rides longer than 30 minutes. *See Tasby* v. *Wright*, 520 F.Supp. 683, 714-733 (N.D. Tex. 1981), *aff'd* No. 82-1121 (5th Cir. 1983). Yet the panel majority in the instant case says (Pet. App. 12a):

> "This constitutionally erected barrier to the operation of segregated schools applies to all children within the school system, including those in elementary grades."

Plainly the law is being unequally applied in these cases, and lower courts are sorely in need of guidance from this Court

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[2] Citing *Stout* v. *Jefferson County Board of Education*, 537 F. 2d 800 (5th Cir. 1976); *Carr* v. *Montgomery County Board of Education*, 377 F.Supp. 1123 (M.D. Ala. 1974), *aff'd* 511 F.2d 1374 (5th Cir. 1975), *cert. denied* 423 U.S. 986 (1975); *Swann* v. *Board of Education*, 402 U.S. 1, 26, 31 (1971); *Lee* v. *Macon County Board of Education*, 616 F.2d 805, 812 (5th Cir. 1980). These are the very same cases we rely on in urging this Court to grant certiorari in the instant case. See especially No. 83-129 Pet. 28-30.

regarding the proper interpretation of *Swann*, particularly as it affects children of tender years.

Fourth. The Solicitor General says (Br. Op. 7) this case "presents no novel legal issues." We disagree. No federal court has ever closed a perfectly good school, much less a rural community's only school, as a remedy in a desegregation case. And the district court acted alone in this case, wholly outside the submissions of the parties. There is in this case, we respectfully submit, a question of remedial authority worthy of a hearing in the Nation's last resort of equal justice under law.[3]

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[3] This Court has already agreed to hear *Memphis Fire Department* v. *Stotts*, No. 82-229, and its companion *Firefighters Local Union* v. *Stotts*, No. 82-209, which also raise troubling questions regarding the scope of federal judicial authority in an analogous context. See Brief of Petitioners, *Memphis Fire Department, et al.*, v. *Stotts*, No. 82-229, especially at 36-38.

CONCLUSION

For the above additional reasons, it is respectfully submitted that the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 4, 1983